

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-
75-7058

In The
United States Court of Appeals
For The Second Circuit

CY SEYMOUR,

Plaintiff-Appellee.

vs.

BACHE and COMPANY, Incorporated, and ALEX CANAAN,

Defendants-Appellants.

**APPENDIX FOR
DEFENDANTS-APPELLANTS**

BENEDICT GINSBERG

*Attorney for Defendant-Appellant
Bache and Company, Incorporated*

475 Fifth Avenue

New York, New York 10017

(212) MU 3-7079

PAUL R. SCOTT

*Attorney for Defendant-Appellant
Alex Cnaan*

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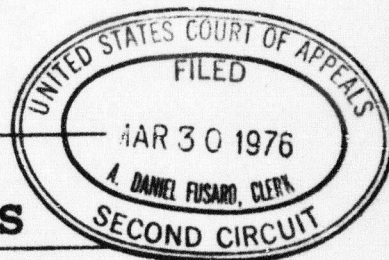


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DOCKET ENTRIES

A

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY

Jury demand date:

75 CIV. 3722

D. C. Form No. 106 Rev.

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ATTORNEYS 0844 rg

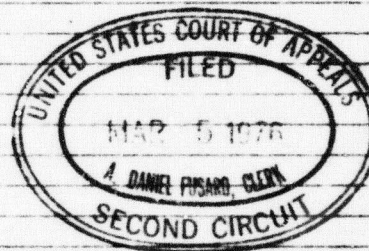
SEYMOUR, CY

-VS-

BACHE & CO. INC.
CANAAN, ALEX

For plaintiff:

Lipkin & Weisberg
225 Broadway
New York, N.Y. 10007
tele: 233-2750



For defendant:

Benedict Ginsberg
475 Fifth Ave. NY10017 MU 3-7070
(Bache & Co. Inc.)

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

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Clerk

JUL 30 1975

JTH

J.S. 6 mailed

Marshal

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Docket Entries

B

Tenney Cy Seymour -vs- Bache & Co.Inc. and Alex Canaan

DATE	PROCEEDINGS	Da Jud.
07-30-75	(1) Filed complaint and issued summons.	
08-13-75	(2) Filed summons and ent. marshal's return served on: (1) Alex Canaan by M. Mark Wiley 8-1-75 (2) Bache & Co. Inc. by M.J. Falus 8-5-75.	
08-13-75	(3) Filed Pltffs Notice to take deposition of Alex Canaan & production of documents, with atchd marshal's return. Served "by Wiley, 8/1/75	
08-13-75	(4) Filed Pltffs Notice to take deposition of Deft. Bache & Co. Inc. & production of documents with atchd marshal's return. Served Bache & Co. Inc. by Melvyn J. Rallis, 8/6/75	
08-25-75	(5) Filed Deft. Bache & Co. Inc. response to notice of production of documents.	
09-05-75	(6) Filed Stip & Order extending time for deft. Alex Canaan to answer complaint to 9/30/75. Tenney, J	
09-17-75	(7) Recd this date - Filed Deft. Bache & Co. Inc. Affdvt & Notice of motion re: arbitration 9/1	
09-16-75	(8) Filed Affdvt by Paul R. Scott for Deft. Alex Canaan in support of motion re: arbitration ret. 9/16/75.	
09-16-75	(9) Filed Pltffs Memorandum in opposition to motion of Defts to stay all proceedings.	
09-17-75	(10) Filed Suppl. Affdvt by Benedict Ginsberg for deft. Bache & Co. Inc. in support of motion to stay action of existing agreement to arbitrate.	
01-14-76	(11) Filed OPINION 1/14/76. Motion to stay the instant proceeding is denied. Tenney, J (s)	
02-13-76	(12) Filed Deft. Bache & Co. Inc. Notice of Appeal from order entered in action on 1/14/76 denying motion of same for an order staying action pursuant to 9 USC, Sec. 3, on ground that valid arbitration agreement exists between parties and from each & every part of said order, as well as whole thereof. (mailed copy to Lipkin & Weisberg & Paul R. Scott on 2/13/76)	
02-09-76	(13) Filed ANSWER of Deft. Bache & Co. Inc.	BC
02-24-76	(14) Filed Deft. Canaan's Notice of Appeal w/rwvs 1/14/76 denying motion for any order staying action pursuant to 9 USC, Sec. 3 on ground that valid arbitration agreement exists between parties & from each & every part of order. (mailed copy to Benedict Ginsberg & Lipkin & Weisberg, Esqs. on 2/24/76)	

A TRUE COPY

RAYMOND F. BURCHARDT, CLERK

Deputy Clerk

NOTICE OF MOTION (Filed September 17, 1975)

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CY SEYMOUR,

Plaintiff,

-against-

BACHE & CO. INC. and ALEX CANAAN,

Defendants.

NOTICE OF MOTION

Index No.:
75 Civ 3722

CHT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Benedict Ginsberg, sworn to the 4th day of September, 1975, and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court on the 17th day of September, 1975, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States District Courthouse, Foley Square, New York, New York, ^{Room 1904} ~~Room 104~~ for an order staying the within action on the grounds of an existing valid agreement to arbitrate all disputes between the parties, and for such other and further relief as to the Court may seem just and proper.

Notice of Motion

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, shall be served upon the undersigned at least five (5) days before the return date of this motion.

Dated: New York, New York
September 4, 1975.

Yours, etc.

BENEDICT GINSBERG
Attorney for Defendant,
Bache & Co. Inc.
Office & P.O. Address
475 Fifth Avenue
New York, New York 10017
Mu 3 7079

TO: LIPKIN & WEISBERG, ESQS.
Attorneys for Plaintiff
225 Broadway
New York, New York 10007
233-2750

PAUL SCOTT, ESQ.
Attorney for Defendant Canaan
600 Madison Avenue
New York, New York 10022
PL 1-5200

AFFIDAVIT OF BENEDICT GINSBERG IN SUPPORT OF MOTION
(Filed September 17, 1975)

3a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

CY SEYMOUR,

AFFIDAVIT

Plaintiff,

Index No.
75 Civ 3722

-against-

BACHE & CO. INC. and ALEX CANAAN,

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am the attorney for defendant Bache & Co. Inc.
(hereinafter Bache), and submit this affidavit in support of
the within motion to stay this action.

On December 5, 1970, the plaintiff entered into and
signed a margin agreement with the defendant Bache (a copy of
which is annexed hereto as Exhibit A).

Paragraph 14 of that margin agreement requires any
controversy arising between the parties to the contract to be

Affidavit of Benedict Ginsberg in Support of Motion

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settled by arbitration.

On August 6, 1975, the plaintiff commenced the within action, against Bache & Co. Incorporated and Alex Canaan, Bache's ex-employee who was the plaintiff's Registered Representative, to recover damages caused by the alleged "churning" of the plaintiff's account by the defendant Canaan. Bache's liability, if any, arises from the fact that Canaan was Bache's employee, and that Bache allegedly failed to supervise his handling of the plaintiff's account.

The question of law presented herein is whether paragraph 14 of the margin agreement confers exclusive jurisdiction upon the arbitration tribunals named in the margin agreement, to hear the plaintiff's claim for damages, and consequently, whether plaintiff's sole remedy is therefore by arbitration as set forth in said agreement.

Clearly, the parties to this action entered into a valid and binding margin agreement, paragraph 14 of which provides:

"This contract shall be governed by the laws of the State of New York...any controversy arising out of or relating to my account, to transactions with or for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules

then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange, as I may elect... . If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election.

The fact that arbitration agreements are a favored means of controversy resolution is evidenced in both New York and Federal law. The New York CPLR states at Section 7501:

"A written Agreement to submit any controversy thereafter arising or any existing controversy to arbitration, is enforceable without regard to the justiciable character of the controversy, and confers jurisdiction on the Courts of the State to enforce it and to enter judgment on an award."

The United States Arbitration Act, 9U.S.C. § 1 et seq., also favors the use of arbitration. Section 2 of that Act states in part:

"A written provision in...a contract evidencing a transaction involving commerce, to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

It has consistently been held that Courts in construing

arbitration agreements under the Federal Act will give effect to the intent of the parties as evidenced by the agreement itself and will, therefore, liberally construe such agreements. Arlington Towers Land Corp. v. John McShain, Inc., 150 F.Supp.904, 923

In the circumstances, the Court should, in the absence of some waiver of the clause or some overriding principle of law to the contrary, compel compliance with the terms of the agreement executed by the parties, which evidences their chosen manner of dispute-resolution.

The issue here is to determine whether any overriding provision of Federal law precludes arbitration of this controversy. To answer this question, it is necessary to view the factual situation presented in light of the decision of the Supreme Court in Wilko v. Swan, 346 U.S. 327 (1953), which precludes arbitration in certain circumstances.

Wilko held that agreements to arbitrate future disputes were invalid as violations of Section 14 of the Securities Act of 1933.

Section 14 of that Act which is similar in effect to the Securities Act of 1934, violations of which are alleged in the complaint, provides:

"Contrary stipulations void. Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this Title or of the rules and regulations of the Commission shall be void."

Agreements to arbitrate in the future were construed by the Supreme Court in Wilko, supra, to constitute a prohibited "stipulation...to waive...(a) provision of this Title..." (Securities Act of 1933) because an agreement to arbitrate in the future was a waiver of the right to a jury trial set forth in the Securities Act of 1933.

The gravamen of the instant complaint, a copy of which is annexed hereto as Exhibit B, arises from a state of facts alleged to have commenced prior to the execution of the arbitration agreement. The plaintiff therefore did not agree to arbitrate disputes concerning future conduct, but concerning a course of conduct in which the parties had been engaging for over a year.

Affidavit of Benedict Ginsberg in Support of Motion

8a

The acts complained of in the complaint are alleged to have been continuous from the beginning to the end of the customer relationship between the plaintiff and the defendant Canaan.

In addition, those acts complained of, as against the defendant Bache, are not specific and wilful violations of the Securities Exchange Acts. Bache's liability is derivative in nature. It is not Bache's misconduct that gives rise to any liability on its part but the relatively simple issue of whether Bache's supervision was adequate and in this context Bache is, by statute (15 USC 78t) not liable if it acted in good faith. Its defense resting on the simple issue of good faith.

The plaintiff should not be permitted to evade his obligation to arbitrate his common law dispute with the defendant Bache, as he is required to do by his contract..

Sworn to before me this
4th day of September, 1975.

PT

BENEDICT GINSBERG

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

9a

CUSTOMER'S AGREEMENT

3. All transactions for my account shall be subject to the constitutions, rules, regulations, customs and usages, as the same may be constituted from time to time, of the exchange or market (and its clearing house, if any) where and to which I am connected by my business.

4. Any and all credit balances, securities, commodities or contracts relating thereto, and all other property of whatsoever kind belonging to me or in which I may have an interest held by you or carried for my accounts shall be subject to a general lien for the discharge of my obligations to you (including, but not limited to, my obligations) however arising and without regard to whether or not you have made advances with respect to such property and without notice to me and to be carried in your general ledger and all securities may be pledged, sold, transferred, hypothecated or sub-hypothecated, separately or in common with other securities or other property, for the sum due to you thereon or for a greater sum of money, all of them remaining in your possession and control for delivery a like amount of similar securities or other property. At any time and from time to time you may, without restriction, without notice to me, apply and/or transfer any securities, commodities, contracts relating thereto, cash or any other property then held by me or by me jointly with any of my accounts, whether individual or joint or from any of my accounts in an account guaranteed by me. You are specifically authorized to transfer to my cash account or the settlement day following a purchase made in my cash or margin funds available in any of my margin accounts, in whole or in part, any and all securities, commodities or contracts then registered in any of my margin accounts or in any non-regulated commodity account, sufficient to make full payment of my cash obligations to you, and that any debit or sum in any of my accounts may be transferred by you at your option to my margin account.

[illegible]

6. All orders for the purchase or sale of commodities for future delivery made Against a "long" position in any commodity contract entered into prior to March 1 will give instructions to liquidate, or place your order for liquidation cannot be executed under prevailing conditions, you may without notice, and on any terms and by any method which may be feasible, Against a "short" position before the last trading day of the delivery month I will give you the right to require you may without demand or notice, cover the contract, and enter into the actual commodity and make delivery thereof upon any terms and by any

method chosen and by you as indicated when authorized or required by the Exchange where accepted, and at least five business days before the first notice day of the delivery month, deliver to me all documents, and on the event such forwarding instructions are received, make the contracts for the delivery and dispose of the commodity upon such commodity and its price as existing thereby, and at least five business days before the first notice day of the delivery month, deliver to me all documents, and if default thereon, the maturity date hereof, and under prevailing conditions, you may procure the commodity for resale.

7. All transactions in any of my accounts are to be paid on or after the date specified in the schedule of payments. If the actual delivery date is later than the scheduled date, the actual delivery date shall be deemed to be the scheduled date.

5 I agree that, in giving orders to sell, with interest, I am authorizing the Firm to place orders with the Firm, and that orders will be designated as "long" and that the designation of a sell order as "long" is a representation of the fact that I own the security and that the security is not in your possession that it

12. Reports of the execution of orders and statements of my witnesses, and any other documents or reports submitted to me, are not to be made available to the press or to the public, and are to be destroyed after transmittal to me by mail or otherwise.

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10a

ACROSS NAME: HENDERSON, RICHARD TO 22

NAME HEREIN REFERRED TO
C. Seymour

41059/3.27¹²/12/70

12. No waiver of any provision of this agreement in its entirety or waiver of any of its provisions, nor a continuing waiver of the provision or provisions so

13. I understand that no provision of this agreement can be amended or waived except in writing signed by an officer of your Company, and that this agreement shall continue in force until its termination by me is acknowledged in writing by an officer of your Company, or until written notice of termination by you shall have been mailed to me at my address last given you.

[illegible]

15. If any provision hereof is or at any time should become inconsistent with a law, rule or regulation of any securities or commodities exchange or of any sovereign government or a regulatory body thereof and if any such law, rule or regulation has jurisdiction over the subject matter of this agreement, said provision shall be deemed to be superseded or modified to conform to such law, rule or regulation, but in all other respects this agreement shall continue and remain in full force and effect.

LAI:

15/15/70

CUSTOMER'S SIGNATURE _____

Cap. Seymour

LETTERS OF AGREEMENT

YOU AND ANY FIRM SUBMITTING TO YOUR FIRM ARE HEREBY ADVISED THAT WE WILL NOT BE RESPONSIBLE FOR ANY LOSS OF OR DAMAGE TO ANY PROPERTY WHICH YOU MAY BE CARRYING FOR ME ON MAR 21 1968. THIS AUTHORIZATION SHALL APPLY TO ALL TRANSACTIONS. A REVOCATION OF THIS AUTHORIZATION IS ACCEPTED BY YOU AT YOUR OFFICE ON MAR 21 1968. NEW YORK

LAF

10/11/10

CUSTOMER'S SIGNATURE _____

4. Hygiene

7002-214

ONLY SIGN THIS FORM IN THE TWO SIGNATURE SPACES INDICATED ABOVE IN THE CASE OF JOINT ACCOUNTS. BOTH TENANTS SHOULD SIGN IN BOTH SIGNATURE SPACES. RETURN TO BUREAU OF LANDS TO THE BACKS OFFICE WHICH SERVICES YOUR ACCOUNT. DO NOT REPLICATE. DO NOT SIGN IN THE SPACES FOR JOINT TENANTS.

PLEASE READ BOTH SIDES BEFORE SIGNING

U.S. A.

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EXHIBIT B - COMPLAINT

11a

(pp. 11a-27a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judge Tenney

Index No. 75 Civ. 3722

CY SEYMOUR,

Plaintiff,

COMPLAINT

-against-

PLAINTIFF DEMANDS
TRIAL BY JURY

BACHE & CO., INC. and ALEX CANAAN,

Defendants.

Plaintiff, by his attorneys, Lipkin & Weisberg, Richard J. Blumberg of counsel, upon information and belief, for his complaint against the defendants alleges as follows:

FIRST: Plaintiff, Cy Seymour, is and was at all times hereinafter mentioned a resident of the City of Brookville, New York, State of New York.

SECOND: The defendant, Bache & Co. Inc. ("Bache") was and is at all times hereinafter mentioned a New York Corporation with its principal offices located in the City of New York, State of New York.

THIRD: Defendant Bache, at all the times hereinafter mentioned, was and is engaged in the securities brokerage business and

was and is a broker and dealer in securities registered with the United States Securities and Exchange Commission and was and is a member of the New York Stock Exchange and the National Association of Securities Dealers, Inc. (The N.A.S.D.).

FOURTH: The defendant Alex Canaan ("Canaan"), at all the times hereinafter mentioned, was and is a resident of Jericho, New York, State of New York.

FIFTH: The defendant Alex Canaan ("Canaan") was employed by defendant Bache as a securities salesman in defendant Bache's branch office located in Massapequa, New York, from in or about July 1, 1969 to in or about July 1, 1972 and was thereafter employed at defendant Bache's 1411 Broadway Branch, New York City, New York from in or about May 1, 1973 to in or about May 1, 1974.

SIXTH: Defendant Bache was, at all times hereinafter mentioned, a controlling person as that term is described in Section 20(a) of the Securities Exchange Act of 1934 ("The Exchange Act"), 15 U.S.C. § 78t(a).

SEVENTH: At all the times hereinafter mentioned, the defendants, jointly and severally, used the United States Mails and other instrumentalities of interstate commerce in perpetration and in furtherance of the violations of the various statutes and rules as more fully described herein.

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EIGHTH: This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331(a) in that, the matters in controversy exceed the sum of \$10,000 and arises under the Exchange Act. Further, this Court has jurisdiction pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and under the principles of pendent jurisdiction.

AS AND FOR PLAINTIFF'S FIRST CAUSE OF ACTION
AGAINST ALL NAMED DEFENDANTS:

NINTH: Plaintiff, repeats, reiterates, realleges and reaffirms each and every allegation set forth in paragraph "FIRST" through "EIGHTH" as if more fully set forth herein.

TENTH: On or about July 1, 1969, plaintiff acting on the inducement and recommendation of defendant Canaan opened a securities account to purchase and sell securities at defendant's Bache's branch office located in Massapequa, New York.

ELEVENTH: At all times hereinafter mentioned, defendant Canaan was the salesman managing plaintiff's security accounts and as a result thereof, received commissions in connection with all purchases and sales of securities in plaintiff's accounts while plaintiff's securities accounts were maintained with defendant Bache. At all times hereinafter mentioned, defendant Bache likewise received commissions in connection with all purchases and sales of securities in plaintiff's accounts while the accounts were maintained with defendant Bache.

TWELFTH: From in or about July 1, 1965 through in or about June 30, 1972, and thereafter from in or about May 1, 1973 and through in or about May 31, 1974, defendant Bache and defendant Canaan, jointly and severally, wilfully violated and aided and abetted in wilfull violations of 810(b) of the Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5, promulgated thereunder (17C.F.R. 240.10b-5) in that the defendants directly and indirectly by and with the use of the means and instrumentalities of interstate commerce and in connection with the purchase or sale of securities, employed devices, schemes and artifices to defraud and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading and engaged in transactions, acts, practice and a course of conduct which would and did operate as a fraud and deceit upon the plaintiff herein.

THIRTEENTH: As part of the aforesaid conduct, acts, practices and activities, the defendants did, among other things:

- (a) Induce the plaintiff to sell all of his investments which were generally unspeculative and of a good grade and quality.
- (b) Exercise discretion and control over plaintiff's security accounts and frequently would and did purchase and sell securities without the prior approval or knowledge of the plaintiff herein.
- (c) Exercise discretion and control over the frequency and volume of transactions in plaintiff's security accounts.

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(d) Cause an excessive number of transactions in plaintiff's security accounts without the express permission or authority of the plaintiff.

(e) Recommend and induce the plaintiff to permit the defendants to engage in an excessive number of transactions in plaintiff's security accounts.

(f) Engage in multiple transactions in the same security.

(g) Switched from one security to another within short periods of time, on which commissions and profits or losses were taken without regard to the investment needs and objectives of the plaintiff.

(h) Purchase and sell securities for plaintiff's accounts for the purpose and intent of generating commissions without regard to the plaintiff's needs and objectives.

(i) Open a margin account for the plaintiff without prior approval or authorization of the plaintiff herein.

(j) Transfer fully paid-for securities including high-grade municipal bonds from the plaintiff's cash account to plaintiff's margin account without prior approval or consent of the plaintiff.

(k) Enter orders to purchase securities on margin and thereby incurred increasingly larger margin indebtedness for plaintiff without regard to the speculative nature of such transactions or to the needs and objectives of the plaintiff.

(l) Engage in highly speculative transactions in plaintiff

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accounts including but not limited to purchases of speculative and unseasoned securities, purchases on margin, "short selling", purchases and sales of options, and purchase and sales of warrants.

(m) Induce plaintiff into believing that excessive and frequent trading and speculative investments were in the plaintiff's best interest.

(n) Induce plaintiff into relying on the judgment of the defendant and their expertise with respect to investments in plaintiff's account.

(o) Fail to properly supervise the activities of defendant Canaan in connection with the activities described herein.

(p) Omit to state to plaintiff that such acts, practices, and courses of conduct were in violation of the Rules and Constitution of the New York Stock Exchange and in particularly Rule 405.

(q) Omit to state to plaintiff that such acts, practices, and course of conduct were in violation of the N.A.S.D. Rules and regulations and in particular, Article, 3 Section 3 of the N.A.S.D. Rules Fair Practice.

(r) Omit to state to plaintiff material facts relative to a margin account and the manner in which a margin account operated

(s) Omit to inform plaintiff as to the true condition of the accounts maintained with the defendants and in particular the amount of losses from excessive and speculative trading.

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(t) Fail to evaluate and supervise the plaintiff's accounts and whether such excessive trading and speculative investments were suitable to the needs and objectives of the plaintiff.

FOURTEENTH: As a result of the acts, practices and course of conduct and omissions of the defendants as more fully described heretofore and as a result of the wilfull violations of the Securities Exchange Act of 1934 and the rules promulgated thereunder, the plaintiff sustained damages in the amount of \$200,000.00

AS AND FOR THE PLAINTIFF'S SECOND CAUSE OF ACTION
AGAINST ALL NAMED DEFENDANTS:

FIFTEENTH: Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation set forth in paragraphs "FIRST" through "THIRTEENTH", as if more fully set forth herein.

SIXTEENTH: Commencing in or about July 22, 1969 and to in or about December 31, 1971, the plaintiff was induced by the defendants to deposit into his security accounts approximately \$85,000 consisting of cash and securities.

SEVENTEENTH: During the period from approximately July 22, 1969 through in or about July 1, 1972, and during the period from in or about May 1, 1973 up to and including July 31, 1974 and as a result of the exercise and control by the defendants of plaintiff's security accounts and as a result of the excessive transactions initiated by the

defendants either with or without authorization of the plaintiff and as a result of the other acts and practices of the defendants described herein, the plaintiff was damaged by approximately \$60,000.00, which amount represents losses from purchases and sales of securities.

AS AND FOR THE PLAINTIFF'S THIRD CAUSE OF ACTION
AGAINST ALL NAMED DEFENDANTS

EIGHTEENTH: Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation set forth in paragraph "FIRST" through "THIRTEENTH and SIXTEENTH" as if more fully set forth herein.

NINETEENTH: During the period from July 22, 1969 to to and including July 1, 1972, the defendants engaged in approximately 620 separate securities transactions in plaintiff's security accounts for total purchases amounting to approximately \$2,393,000.00 and total sales of approximately \$2,252,000.00.

TWENTIETH: The aforesaid transactions described in paragraph "NINETEENTH" above were excessive in frequency and number and constituted violations of Section 10(b) of the Exchange Act of 1934, 15 U.S.C. 878j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 240.10b-5).

TWENTY-FIRST: As a result of the aforesaid transactions described in paragraph "NINETEENTH" above and the other activities of the defendants described herein, plaintiff was damaged by approximately

\$56,000.00 representing the amount of commissions charge to plaintiff by defendants.

AS AND FOR PLAINTIFF'S FOURTH CAUSE OF ACTION
AGAINST ALL NAMED DEFENDANTS

TWENTY-SECOND: Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation contained in paragraphs "FIRST" through "THIRTEENTH and "NINETEENTH", as if more fully set forth herein

TWENTY-THIRD: In furtherance of defendant's scheme to defraud the plaintiff herein and as a device to generate additional purchases of securities, the defendants entered transactions in plaintiffs' margin account, short account and bond account and thereby created margin indebtedness and interest charges for the plaintiff herein.

TWENTY-FOURTH: As a result of the defendants' activity described above, plaintiff suffered damages in an amount of approximately \$40,000.00.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST ALL
NAMED DEFENDANTS

TWENTY-FIFTH: Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation contained in paragraphs "FIRST" through "THIRTEENTH" and "NINETEENTH" as if more fully set forth herein.

TWENTY-SIXTH:

As a result of the acts, practices and courses of conduct more fully described heretofore, the plaintiff was induced to place full trust, confidence and reliance upon the defendants and as a result thereof, defendants exercised control discretion and management over the plaintiff's investments.

TWENTY-SEVENTH:

By defendants' conduct as hereinbefore alleged, the defendants jointly and severally violated their common-law fiduciary duty and obligations and breached their duty of trust imposed upon them as fiduciaries and as a result thereof, the plaintiff seeks punitive and exemplary damages in the amount of \$250,000.00.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST
ALEX CANAAN INDIVIDUALLY

TWENTY-EIGHTH:

Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation contained in paragraphs "FIRST", "SEVENTH" and "EIGHTH" as if more fully set forth herein.

TWENTY-NINTH:

From in or about July 1, 1972 to in or about May 1, 1973, defendant Canaan was employed as a security salesman and branch manager at the securities firm of Weis, Voisin & Co., Inc. ("Weis, Voisin").

THIRTIETH:

In or about July 1, 1972, plaintiff at the inducement of defendant Canaan transferred all of his securities accounts then maintained at defendant Bache to Weis, Voisin.

THIRTY-FIRST:

Weis, Voisin was then engaged as a broker and dealer in securities registered with the Securities and Exchange Commission and was a member of the New York Stock Exchange and the N.A.S.D. In or about May 15, 1973 Weis, Voisin ceased all business and was liquidated pursuant to the Securities Investors Protection Act of 1970.

THIRTY-SECOND:

From in or about July 1, 1972 to in or about May 1, 1973, defendant Canaan was the salesman managing plaintiff's security accounts and would and did receive commissions from the purchase and sale of securities in plaintiff's account.

THIRTY-THIRD:

From in or about July 1, 1972 up to in or about May 1, 1973, the defendant Canaan wilfully violated Section 10(b) of the Exchange Act of 1934, 15 U.S.C. j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. 240.10b-5) in that defendant by and with the use of the means and instrumentalities of interstate commerce, in connection with the purchase or sale of securities in plaintiff's account employed devices, schemes and artifices to defraud the plaintiff and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading and engaged in transactions, acts, practices, and a course of conduct which would and did operate as a fraud and deceit upon the plaintiff.

THIRTY-FOURTH:

As part of the aforesaid conduct, acts, practices and activity, the defendant would and did, among other things, the following:

(a) Exercise discretion and control over the accounts of the plaintiff and would and did purchase and sell securities in plaintiff's accounts without the prior approval or knowledge of plaintiff.

(b) Exercise discretion and control over the frequency and volume of transactions in plaintiff's accounts.

(c) Recommend and induce an excessive number of transactions in plaintiff's accounts.

(d) Switch from one security to another, on which commissions and profits or losses, were taken without regard to the plaintiff's investment needs and objectives.

(e) Purchase and sold securities for plaintiff's account for the purpose and intent of generating commissions without regard to the plaintiff's needs and objectives.

(f) Enter orders to purchase securities on margin incurring increasingly larger margin indebtedness and interest payments for the plaintiff without regard to the speculative nature of such transactions or the needs and objectives of the plaintiff.

(g) Enter orders to sell securities "short", to purchase speculative and unseasoned securities, to buy and sell options, and to buy and sell warrants without regard to the speculative nature of such transactions.

(b) Induce plaintiff into relying fully on the judgment and expertise of defendant Canaan with respect to the investments in plaintiff's accounts and induced plaintiff into believing that defendant Canaan's course of conduct was in the plaintiff's best interest.

(i) Made investment decisions regarding plaintiff's account without regard to the needs and objectives of the plaintiff.

(k) Omitted to state that such acts, practices and course of conduct were in violation of the Rules and constitution of the New York Stock Exchange and in particular, Rule 405.

(l) Omitted to state that such acts, practices and course of conduct were in violation of the N.A.S.D. Rules and Regulations and in particular, Article 3, Section of the N.A.S.D. Rules of Fair Practice.

THIRTY-FIFTH: As a result of the acts and practices and course of conduct of defendant Canaan, as more fully described herein and as a result of the wilfull violations of the Securities Exchange Act of 1934, the plaintiff sustained damages in an amount of \$100,000.00

AS AND FOR A SECOND CAUSE OF ACTION AGAINST
DEFENDANT CANAAN

THIRTY-SIXTH: Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation set forth in paragraphs "TWENTY-EIGHTH" through "THIRTY-FOURTH" as if more fully set forth herein

THIRTY-SEVENTH:

From in or about July 1, 1972 up to and in or about April 30, 1973, defendant Canaan entered approximately 80 separate transactions in plaintiff's accounts for total purchases of approximately \$250,00.00 and total sales of approximately \$225,000.00

THIRTY-EIGHTH:

As a result of the aforementioned activities, acts, practices and courses of conduct of defendant Canaan plaintiff was damaged in an amount of approximately \$74,000.00 consisting of losses from purchases and sales of securities of approximately \$50,000.00, commissions generated by defendant Canaan and paid by plaintiff of approximately \$6000.00 and margin interest charged to the plaintiff of approximately \$18,000.00.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST
DEFENDANT ALEX CANAAN:

THIRTY-NINTH:

Plaintiff repeats, reiterates, realleges and reaffirms each and every allegation contained in paragraphs "TWENTY-EIGHTH", "THIRTY-FOURTH" and "THIRTY-SEVENTH" as if more fully set forth herein.

FORTIETH:

As a result of the acts, practices and courses of conduct more fully described heretofore, the plaintiff was induced to place full trust, confidence and reliance upon defendant Canaan and as a result thereof, defendant Canaan exercised control,

discretion and management over the plaintiff's investment.

FORTY-FIRST: By defendant's conduct as hereinbefore alleged, the defendant violated his common-law fiduciary duty and obligations and breached his duty of trust imposed upon him as a fiduciary and as a result thereof, the plaintiff seeks exemplary and punitive damages in the amount of \$150,000.00.

WHEREFORE, The plaintiff demands judgment against the defendants as follows:

(a) As and for the First Cause of Action compensatory damages in the amount of \$200,000.00 and punitive damages in the amount of \$200,000.00.

(b) As and for the Second Cause of Action - \$60,000.00

(c) As and for the Third Cause of Action - \$56,000.00

(d) As and for the Fourth Cause of Action - \$40,000.00

(e) As and for the Fifth Cause of Action - \$250,000.00

(f) As and for the First Cause of Action against defendant Alex Canaan individually, compensatory damages in the amount of \$100,000.00 and punitive damages in the amount of \$150,000.00.


(g) As and for the Second Cause of Action against defendant Canaan individually - \$74,000.00

(h) As and for the Third Cause of Action against defendant Canaan - \$150,000.00

As to all causes of action as to which, damages, interest, and costs, and for such other and further relief as the Court may deem just.

Dated: New York, New York

July 21, 1975


LIPKIN & BLUMBERG

RICHARD J. BLUMBERG Of Counsel

Attorneys for Plaintiff

Office & P.O. Address

225 Broadway

New York, New York 10007

(212) 233-2750

Exhibit B - Complaint

(pp. 11a-27a)

By Seymour

11 Pepperidge Road Westbury, N.Y.

Service Arts Studio 111 South St. Westbury, N.Y.

CUSTOMER'S OCCUPATION: Owner

HUSBAND'S NAME & NATURE OF BUSINESS:

U.S. CITIZEN: ☒ YES ☐ NO

TYPE OF ACCOUNT: ☒ CASH ☐ MGN ☐ STOCK ☐ COMMODITY ☐ CURRENCY

RELATED TO BACHE OFFER OR EMPLOYEE: ☐ YES ☒ NO

IF YES NAME & RELATIONSHIP:

BRANCH DATA: Union Line, 50th & Park Avenue, New York

APPROVAL BY BRANCH OFFICER: [Signature]

AFFIDAVIT OF PAUL R. SCOTT IN SUPPORT OF MOTION
(Filed September 16, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CY SEYMOUR,

Plaintiff,

-against-

BACHE & CO., INC. and ALEX CANAAN,

Defendants.

:
: 75 Civ. 3722

: (C. H. T.)

: AFFIDAVIT IN SUPPORT
: OF MOTION
-----X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PAUL R. SCOTT, being duly sworn, deposes and
says:

1. I am the attorney for defendant ALEX CANAAN (hereinafter called "CANAAN"), and submit this affidavit in support of the motion by BACHE & CO., INC. (hereinafter called "BACHE"), to stay this action on the grounds of an existing valid agreement to arbitrate all disputes between the parties.

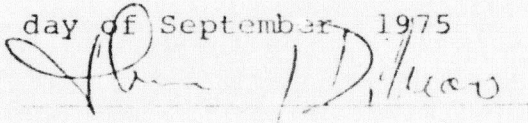
2. The pertinent facts and law are set forth in the affidavit of BENEDICT GINSBERG, Esq., the attorney

Affidavit of Paul R. Scott in Support of Motion

for BACHE, in support of BACHE'S motion. For the same reasons set forth in said affidavit, defendant CANAAN joins in the instant motion for the order requested by defendant BACHE.

Sworn to before me this 10th

day of September, 1975



THOMAS J. DE MAIO
Notary Public, State of New York
No. 31 6016525
Qualified in New York County
Commission Expires March 30, 1976



PAUL R. SCOTT
Attorney for defendant
ALEX CANAAN
600 Madison Avenue
New York, New York 10022.
(212) 751-5200

SUPPLEMENTAL AFFIDAVIT OF BENEDICT GINSBERG
(Filed September 17, 1975)

AIR MAIL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
CY SEYMOUR,

SUPPLEMENTAL
AFFIDAVIT

Plaintiff,

BACHE & CO. INC. and ALEX CANAAN,

75 Civ 3722
CHT

Defendants.
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

BENEDICT GINSBERG, being duly sworn, deposes and says:

I am the attorney for the defendant Bache & Co. Inc. (hereinafter Bache), and submit this supplemental affidavit in support of the within motion to stay this action by reason of an existing agreement to arbitrate.

An exhaustive search of the archives at Bache has revealed yet a further agreement to arbitrate, signed almost three years after the margin agreement, which is Exhibit A annexed to the moving papers.

Annexed hereto as Exhibit A-1 is a margin agreement

Supplemental Affidavit of Benedict Ginsberg

signed by the plaintiff on June 4, 1973. According to the complaint, the plaintiff ceased to be an active customer of Bache on or about July 1, 1972, and thereafter returned to Bache as an active customer in May of 1973. The plaintiff alleges that he remained a customer of Bache until July of 1974 (see Exhibit B annexed to moving papers, ¶17th).

The existence of this second agreement to arbitrate makes it clear that if conduct of the prior three years (July 1, 1969 to June 4, 1973) is to be litigated, it is to be arbitrated according to the provisions of paragraph 14 of the margin agreement.

There can be no question but that the plaintiff has agreed to arbitrate disputes concerning "...all of my accounts in which I have an interest, alone or with others, which I have opened, or open in the future..." (emphasis supplied).

In view of the foregoing multiple agreements to arbitrate, it is respectfully requested that the within motion be granted.

Sworn to before me this

12th day of September, 1975.

BENEDICT GINSBERG

ROSE MAMLOUK
Notary Public, State of New York
No. 31708429
Qualified in New York County
Commission Expires March 30, 1976

32a

ACCOUNT NUMBER: [illegible]

Cy Seymour

73-4347-32

LENDING AGREEMENT

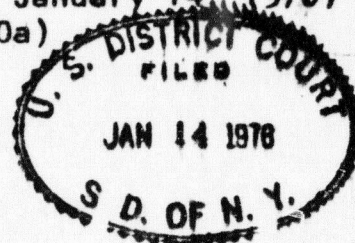
7502-0204

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OPINION OF TENNEY, D.J. (Filed January 14, 1976)
(pp.33a-40a)

33a

Copy



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CY SEYMOUR,

Plaintiff, : 75 Civ. 3722 (CHT)

-----X
against-

BACHE & CO. INC. and
ALEX CANAAN,

Defendants. :
-----X

#43725
MEMORANDUM

TENNEY, J.

Defendants Bache & Co. Inc. ("Bache") and Alex Canaan ("Canaan"), a Bache employee, ^{1/} seek an order of this Court staying the instant action pursuant to 9 U.S.C. § 3 on the ground that a valid arbitration agreement exists between the parties and that the arbitration should be allowed to go forward. For the reasons set forth below, the motion is denied.

On December 5, 1970, plaintiff entered into a margin agreement with Bache. Paragraph 14 of that agreement provided for the resolution of any controversies arising thereunder in an arbitral forum. Paragraph 14 states in pertinent part:

"This contract shall be governed by the laws of the State of New York.... Any controversy arising out of or relating to my account, to transactions with or for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange, as I may elect.... If I do not make such election by registered mail addressed to you at your main office

within five days after demand by you that I make such election, then you may make such election."

On June 4, 1973, plaintiff again signed a margin agreement containing the same arbitration clause.

Plaintiff commenced the instant action on July 31, 1975, charging defendants with violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as several breaches of common law fiduciary duties. The gravamen of the action is "churning".

The issue before the Court is the enforceability of the arbitration agreement in light of the holding of the United States Supreme Court in Wilko v. Swan, 346 U.S. 427 (1953).

In Wilko, a stock purchaser brought suit charging a brokerage house with a violation of Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), based on certain misrepresentations and omissions. Plaintiff had signed a margin agreement containing an arbitration clause similar to that signed in the instant case. The Court found that the arbitration agreement was a "condition" or "stipulation" within the meaning of Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which states:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Hence, the agreement was held to be unenforceable. Noting "the

desirability of arbitration as an alternative to the complications of litigation," id. at 431, the Court nevertheless held that Congress had taken great pains to protect the rights of the buyer of securities and had clearly expressed its intention to forbid the waiver of those specifically created rights. Id. at 438. The waiver, of course, is implicit in the agreement to arbitrate.^{2/} The rule enunciated in Wilko has been held to apply to the Securities Exchange Act of 1934 as well.^{3/} Maheu v. Reynolds & Co., 282 F. Supp. 423 (S.D.N.Y. 1967); Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965); Reader v. Hirsch & Co., 197 F. Supp. 111 (S.D.N.Y. 1961).

Defendants, in the instant case, attempt to distinguish the facts herein from those in Wilko by pointing out that the parties had been engaged in a course of conduct for some seventeen or eighteen months prior to the signing of the agreement in question and presumably some of the alleged violations had already occurred. Thus, defendants conclude that there was no waiver of rights as to future disputes since the violations had presumably already occurred, at least in part, and any rights attendant thereto had presumably accrued. To further buttress this position, defendants cite a second margin agreement signed by plaintiff on June 4, 1973. Defendant would have this Court hold that only where a plaintiff signs an arbitration agreement before any of the violations occurred would the agreement be voided. The Court will not adopt so narrow a view of the Supreme

Court's holding in Wilko,

There have been cases which have upheld the integrity of an agreement, such as an agreement to arbitrate (which involve some waiver of rights). Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242 (3d Cir. 1968).

In Moran, plaintiff complained of certain misrepresentations made in conjunction with purchases for her margin account as well as general overactivity. After lengthy consultation with both the New York Stock Exchange and with the Securities and Exchange Commission (both advised that she seek her remedy at law), plaintiff entered into an agreement to arbitrate the controversy. Plaintiff prevailed in the arbitration, but took an appeal as to the size of the damage award. The arbitral award was upheld throughout the state court system of Pennsylvania and plaintiff then turned to the federal courts. The federal appellate court considered, inter alia, the enforceability of the arbitration agreement in light of Wilko v. Swan, supra, 346 U.S. 427, and noted with regard to the parallel provisions of the 1933 and 1934 Acts;

"The non-waiver provision is almost identically worded in each Act wherein provision is made that any condition or stipulation binding any person to waive compliance with any section of the Act is void." Id. at 245.

The Court went on to distinguish Wilko:

"The Court there [in Wilko] held that the non-waiver provision of the statute was void as to future arbitration controversies and held that

under such circumstances the right to select the judicial forum was one that could not be waived. However, the instant case is on a different footing in that here the Arbitration Submission Agreement was to submit an existing controversy between the parties to arbitration and that differentiation expresses itself in Wilko v. Swan, supra, at p. 438, 74 S.Ct. 182, as well as in the concurring opinion of Justice Jackson, pointing to the fact that present controversies are arbitrable." Id. at 246.

Judge Conner of this court, in Korn v. Franchard Corporation, 388 F. Supp. 1326 (S.D.N.Y. 1975), explained the rationale underlying the enforceability of the waiver provision:

"Section 29(a) and its counterparts, which can be found in all six federal securities acts, prevent professional broker-dealers from circumventing the provisions of those acts by invalidating any attempt to obtain anticipatory waivers of compliance with the provisions of the Securities Exchange Act of 1934, Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953); Junker v. Midterra Ass. Inc., 49 F.R.D. 310, 313 (D.C. 1970), and should not be construed to apply to the release of matured claims. To rule otherwise would foreclose the parties from settling matured claims and force every claimant to pursue the litigation to its costly conclusion. Many small but otherwise settleable cases would have to be dropped and many large but otherwise settleable cases would clog the dockets of the federal courts. This would not only constitute a blow to judicial economy, but to justice and common sense as well." Id. at 1329.

Some additional guidance is given by Mr. Justice Jackson in his concurrence in Wilko where he states:

"I agree with the Court's opinion insofar as it construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. I think thereafter the parties could agree upon arbitration." Wilko v. Swan, supra, 346 U.S. at 438.

The principle which emerges from these cases is that while no waiver in futuro will be allowed, a waiver will be allowed when made at a time when a "controversy" is in existence and when a party has full knowledge of the facts therein. The key seems to be that in the latter instance the party is in a position to examine the alternatives, to seek counsel, and to make an informed judgment prior to the waiver of important rights secured to the stock purchaser by Congress.

The waiver contained in the instant arbitration clause, signed in December of 1970, even if after some of the alleged violations had occurred, was sufficiently in advance of the existence of a controversy to void the agreement. Plaintiff was simply not in a position in December of 1970 to make a voluntary and intelligent waiver of important rights. The fraudulent scheme charged in the complaint was on-going and extended well beyond December of 1970. Thus, even if acts prior to that date could arguably be the subject of an arbitration agreement, clearly those later acts would not properly be the subject of a valid agreement.

The margin agreement signed by plaintiff on June 4, 1973, when he returned his account to Bache is likewise of no avail. When plaintiff returned to Bache in 1973 a new relationship was instituted. The margin agreement signed in furtherance of this new agreement cannot be construed as granting a waiver retroactively to all past acts, particularly those the subject

of the previous business relationship. Even if it could be argued that the dates of the margin agreements might confer jurisdiction as to some transactions and not as to others, judicial economy dictates that this entire matter be tried in one forum. This conclusion is further supported by the apparent presence of defendant Canaan as the common thread that runs throughout the scenario.

The Court must make two final observations. First, while some courts have allowed the common law claims to proceed in the arbitral forum and left the securities claims to the courts, this has not been done where, as here, the issues are complex and intertwined. Shapiro v. Jaslow, 320 F. Supp. 598 (S.D.N.Y. 1970). Second, there has been no authority proffered by defendant Canaan which would permit him to enjoy the benefits of the arbitration agreement signed by Bache. Even if it could be argued that he somehow fell within its ambit while he was employed at Bache, clearly his acts while employed at Weis, Voisin & Co., Inc., were not covered.

Accordingly, defendants' motion to stay the instant proceeding is denied.

So ordered.

Dated: New York, New York
January 14, 1975

CHARLES H. TENNEY

U.S.D.J.

Opinion of Tenney, D.J.

(pp. 33a-40a)

CY SEYMOUR,

Plaintiff,

75 Civ. 3722 (CHT)

-against-

BACHE & CO. INC. and ALEX CANAAN,
Defendants.FOOTNOTES

- 1/ Canaan was employed by Bache from July 1, 1969 until July 1, 1972, and from May 1, 1973 until May 1, 1974. From July 1, 1972 until May 1, 1973, Canaan was employed as a security salesman at Weis, Voisin & Co., Inc. During each of these time periods, Canaan was the representative in charge of plaintiff's account.
- 2/ Defendants' counsel, in a recent letter to the Court, have cited the case of Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), for the proposition that Secur limited Wilko by restricting its application to the 1933 Act. Therefore, defendants conclude that Wilko would have no application to the instant case since it alleges violations of the 1934 Act. Suffice it to say that defendants have misread Scherk which limits the application of Wilko when it comes into play with international arbitration agreements. In Newman v. Shearson, Hammill & Co., Inc., 383 F. Supp. 265 (W.D. Tex. 1974), the court held:
- "Defendant's argument that Wilko was overruled by Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), is incorrect as that case simply carved out a narrow exception to the Wilko holding, and is applicable only to international transactions." Id. at 263.
- 3/ Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, is the equivalent of Section 14 of the 1933 Act and states:

"(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

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UNITED STATES COURT OF APPEALS:2nd CIRCUIT

CY SEYMOUR,

Plaintiff-Appellee,

- against -

BACHE and COMPANY, Incorporated, and
ALEX CANAAN,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn,
 depose and say that deponent is not a party to the action, is over 18 years of age and resides at
 310 West 146th Street, New York, New York
 That on the 30 day of March 1976 at 600 Madison Avenue
225 Broadway

deponent served the annexed affidavit upon
 Paul R. Scott attorney for
 Lipkin and Weissberg attorneys for
 the Appellant, Canaan in this action by delivering a true copy thereof to said individual
 the Appelle personally. Deponent knew the person so served to be the person mentioned and described in said
 papers as the herein,

Sworn to before me, this 30
 day of March 1976

ROBERT T. BRIN
 NOTARY PUBLIC, State of New York
 No. 31-0418950
 Qualified in New York County
 Commission Expires March 30, 1977

James A. Steele
 JAMES A. STEELE